ITA 40/2004
BEFORE
THE HON'BLE MR JUSTICE D. BISWAS
THE HON'BLE SMT. JUSTICE A. HAZARIKA
IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh)

INCOME TAX APPEAL NO.40 OF 2004

Smt. Bandana Gogoi,
W/O Sri Jiba Kanta Gogoi,
Guwahati.

& &.. APPELLANT

- Versus -

1. Commissioner of Income Tax,
Guwahati.

2. Joint Commissioner of Income Tax
(Assessment) Spl. Range-1, Guwahati.

& &.. RESPONDENTS

P R E S E N T

THE HON'BLE MR. JUSTICE D. BISWAS
THE HON'BLE SMT. JUSTICE A.HAZARIKA

For the appellant : Dr. A.K. Saraf, Sr. Advocate
Mr. S.K. Agarwal,
Mr.P.Bothra,
Ms.K.K.Jaim
Ms. N. Hawlia,
Ms. M. Gope, Advocates

For the respondents : Mr. U. Bhuyan,
Standing Counsel, I.T. Deptt.

Date of Hearing : 14.12.2006

Date of Judgment and Order : 9.1.2007

JUDGMENT AND ORDER

(CAV)

By D. Biswas,J.

This appeal under Section 260A of the Income Tax Act directed against the order dated 27.2.2004 passed by the learned Income Tax Tribunal,Guwahati Bench, Guwahati in I.T.A.No.73(Gau) of 2001 and C.O. No.20(Gau) of 2001 has been admitted for hearing by the order dated 1.7.2004. The question formulated was recast at the time of hearing. The question reads as follows :-

Whether on the facts and in the circumstances of the case, the decision of the learned Tribunal is not erroneous in holding that non-issuance of notice under Section 143(2) of the Income Tax Act, 1961 did not invalidate the assessment relating to the block period and was it at-best a mere procedural irregularity ? .

2. We have heard Dr. A.K. Saraf, learned senior counsel for the appellant and also Mr. U. Bhuyan, learned counsel for the Revenue.

3. The appellant is an assessee under the Income Tax Act,1961. He is carrying business of plying buses and other sundry business in cloths, fruits etc. A search and seizure operation was conducted in his business and residential premises at different places in 1997-1998. Cash, jewellery and other valuable articles were recovered during the search operation. Thereafter, the Assessing Officer issued a notice under Section 158BC on 20.8.1998. In response to the said notice, the assessee filed return of income for the block period 1988-1989 to 1998-1999 on 31.3.1999 estimating total income at Rs.86,168/-. Statutory notice under Section 142(1) and other notices were issued and served on the assessee. After hearing the assessee and the departmental representative, the Assessing Officer assessed the total income under Section 158BC/143(3) at Rs.7,90,120/-, and the tax payable thereon has been assessed at Rs.4,74,072/-. The assessee preferred an appeal before the CIT (Appeals), Guwahati. The said appeal was disposed of by the order dated 13.11.2000 holding inter alia that omission on the part of the Assessing Officer to issue notice under Section 143(2) is a procedural mistake, and for that omission, assessment order cannot be nullified as void. The assessee preferred appeal No.ITA 73(Gau) of 2001 before the learned Tribunal. The learned Tribunal by the order dated 27.2.2004 held that non-service of the notice under Section 143(2) is a procedural irregularity, and for that reason the assessment order cannot be disturbed. The learned Tribunal was of the view that the return was filed in response to a notice under Section 158BC and not under Section 139 or in response to any notice under Section 142(1) and, therefore, the requirement of notice under Section 143(2) could be dispensed with.

4. Dr. Saraf, learned senior counsel for the assessee argued at length to justify that even in case of determination of undisclosed income for a block period under provisions of Section 158BC, the provisions of Section142 and sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing a notice under Section 143(2). Dr. Saraf further contended that notice under Section 143(2) could have been dispensed with by the Assessing Officer if he had proceeded to determine the income on the basis of the return without going for scrutiny. Referring to the provisions in Clause (b) of second proviso to Section 158BC, Dr. Saraf argued that the words so far as may be do not denote that the Assessing Officer has been given the discretion to dispense with the requirement of such a notice under Section143(2) when he proceeds to make an enquiry within the scope and ambit of Section 142(2).

5. Mr. Bhuyan, learned counsel for the Revenue submitted that the block assessment following search and seizure as per provisions of Chapter-XIV has to be placed at a different pedestal. According to the learned counsel, if the provision of Clause (b) of Section 158BC is construed as mandatory, it would frustrate the very purpose of block assessment. It is further argued that the words - so far as may be suggest that the provisions of section 142 and sub-sections (2) and (3) of section 143 are directory and the Assessing Officer has the di

scretion to dispense with the requirement depending upon the facts and circumsta nces of each case.

6. In the instant case, the proceeding for block assessment was ini tiated after search and seizure. The appellant assessee submitted return in resp onse to a notice issued under Section 158BC. The Assessing Officer also issued t he notice under Section 142(1), and completed the assessment under Section 158BC and Section 143(3) of the Act. Admittedly, no notice was issued under Section 1 43(2). It is obvious that the Assessing Officer did not act upon the return file d in response of a notice under Section 158BC(a)(ii) and proceeded to complete t he assessment after necessary inquiry as envisaged under Section 142. The proced ure adopted in completing the assessment will be relevant for determining whethe r the words so far as may be are mandatory or directory in the case at hand.

7. Chapter-XIVB deal with the procedure for assessment of search ca ses. Section 158BA provides for assessment of an undisclosed income as a result of search under Section 132. Section 158BB provides the manner of computation o f undisclosed income of the block period. Section 158BC provides the procedure f or block assessment. To appreciate the procedure prescribed, we may quote herein below the relevant provisions of Section 158BC :-

158BC. Where any search has been conducted under section 132 or books of ac count, other documents or assets are requisitioned under section 132A, in the ca se of any person, then.-
(a) (i) & & & &
(ii) in respect of search initiated or books of accounts or other documents or any assets requisitioned on or after the 1st day of January, 1997, serve a n otice to such person requiring him to furnish within such time not less than fif teen days but not more than forty-five days,
as may be specified in the notice a return in the prescribed form and verified i n the same manner as a return under clause (i) of sub-section (1) of section 142 , setting forth his total income including the undisclosed income for the block period :
Provided that no notice under section 148 is required to be issued for the purpo se of proceeding under this Chapter :
Provided further that a person who has furnished a return under this clause shal l not be entitled to file a revised return;

(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 [section 144 and section 145] shall, so far as may be, apply;.
(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;
(d) & & &.. .

8. It would appear from above that a notice under Section 158BC(a)(ii) is a must before the Assessing Officer proceeds to make assessment. This no tice has to be verified in the same manner as a return under Clause (i) of Secti on 142(1). Clause (b) provides for determination of undisclosed income of the bl ock period in the manner laid down in Section 158BB and Clause (c) of Section 15 8BC provides for levy of taxes on determination of undisclosed income. If the As sessing Officer accepts the return so filed, he may straightway pass an order of assessment and determine the tax payable under Clause (c). Instead, if he proce eds to make an inquiry as provided in Section 142, he has to follow the provisio ns of Section 142 as well as the provisions of sub-sections (2) and (3) of Secti on 143.

9. Sub-sections (2) and (3) of Section 143 read as follows :-

Section 143 (2) Where a return has been furnished under Section 139, or in response to a notice under sub-section 91) of Section 142, the Assessing Officer shall,-

(i) where has reason to believe that any claim or loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

[Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June,2003;]

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to producem or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

(3) On the day specified in the notice -

(i) issued under clause (i) of sub-section (2), or as soon afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and determine the sum payable by the assessee on the basis of such assessment;

(ii) issued under clause (ii) of sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant materials which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment :

& & & & & &.. . .

10. Sub-section (1) of Section 143 provides for assessment where return has been made under Section 139 or in response to a notice under sub-section (1) of Section 142. It has no application in this case. Sub-section (2) requires service of two notices under two different circumstances. First notice is to be issued under Clause (i) of sub-section (2) only when the Assessing Officer has reason to believe that any claim or loss, exemption, deduction, allowance or relief made in the return submitted under Section 139 or in response to a notice issued under sub-section (1) of Section 142 is inadmissible. Under Clause (ii) of this sub-section, a notice is required to be issued if the Assessing Officer considers it necessary or expedient to ensure that the assessee has understated the income or has not computed excessive loss or has not underpaid the tax in any manner. Both the clauses (i) and (ii) postulates scrutiny to ensure the correctness of the return. Under Chapter XIV, powers of assessment under sub-section (3) in determining the total income or loss could be invoked only after service of notices as contemplated under clauses (i) and (ii) of sub-section (2). In case of block assessment under Chapter XIV-B, where the Assessing Officer does not proceed to make assessment and determine the tax payable on the basis of the return filed in response to a notice under Section 158BC(a), he has to follow the provisions of sub-section (2) of Section 143. The requirement of a notice under sub-section (2) of Section 143 cannot be dispensed with in a case where the Assessing Officer proceeds to make an inquiry for the purpose of assessment, and deter

mination of taxes payable after issuing notice under Section 142(1) as-well.

11. In the instant case, the Assessing Officer did not act upon the return filed in response to the notice issued under Section 158BC(a). He had issued a notice under Section 142(1). He had proceeded to make an inquiry. This could not be done without a notice under sub-section (2) of Section 143. The provisions of sub-section (3) quoted above clearly shows that the powers under this sub-section could be invoked only after service of notices under sub-section (2). In the instant case, the Assessing Officer admittedly did not follow the provisions of sub-section (2) of Section 143. The words- so far as may be , will thus become mandatory where the Assessing Officer proceeds to make an inquiry in repudiation of the return filed in response to a notice issued under Section158BC. Similarly, application of the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will become directory where the Assessing Officer does not embark upon an inquiry to determine the loss or profit reflected in the return filed.

12. In Dalmia (R) Vs. Commissioner of Income-tax, reported in 236 (ITR) Pg.480, the Hon'ble Supreme Court had the occasion to deal with almost a similar situation with regard to the interpretation of the words - so far as may be occurring in Section 148 of the Act which provides for issue of notice in case of escaped assessment. The Supreme Court was of the view that the provisions of Section 144B being procedural provision could not be excluded by reason of the use of the words - so far as may be . Though the judgment has been rendered in a different context, the ratio available therefrom is of significance in the facts and circumstances of the case. In the instant case, the assessee has filed his return in pursuant to notices issued under Section 158BC(a). The Assessing Officer was not satisfied, and he had proceeded to scrutinize the return. Therefore, he had no option but to follow the mandate of sub-section (2) of Section 143. Under no circumstances, the Assessing Officer could straightway invoke the powers under Clause (c) of Section 158BC without first issuing notice under Section 143(2). In Commissioner of Income Tax -Vs.- M.Chellapan, reported in 281 (ITR) Pg.444, the question for determination before the Madras High Court was, whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the reopening of the assessment under Section 147 of the Act and completion of the assessment without issuing a notice under Section 143 (2) within twelve months is valid. Relying upon a judgment of the Punjab and Haryana High Court in Vipan Khanna -Vs.- CIT (2002) 255 ITR 220, the Madras High Court held that the proceedings under Section 143 of the Act came to an end for want of a notice under Section 143(2) within the stipulated period of twelve months. The decision in Vipan Knanna (supra) is that if the Assessing Officer chooses to verify the return and frame an assessment, he has to issue a notice under sub-section (2) of Section 143 and require the assessee to produce his books of accounts and other materials in support of his return. Only then, the Assessing Officer can make an assessment under sub-section (3) of Section 143 of the Act.

13. Dr. Saraf also relied upon the circular issued by the Board of Direct Taxes which provides that a notice under sub-section (2) can be served on the assessee during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, which ever is later. The circular further provides that the Assessing Officer must serve notice under sub-section (2) on the assessee within this period in a case picked up for scrutiny. It is further clarified that if a notice is not served under Section 143(2), the assessee can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return. The clarification given by the Board has a binding effect on the Department, but not on the Court. However, this circular also clarifies the requirement of law in respect of service of notice under sub-section (2) of Section 143.

14. We have also considered the other decisions relied upon by Dr.Sa

raf in Padmasundra Rao (Decd.) -Vs.- State of Tamil Nadu, reported in 255 (ITR) Pg.147; Hope Textiles Ltd. -Vs.- Union of India, reported in 205 (ITR) Pg. 508; UCO Bank -Vs. Commissioner of Income-tax, reported in 237 (ITR) Pg.889 and Benga l Tea and Fabrics Ltd. -Vs. Assistant Commissioner of Taxes, reported in 223 (IT R) Pg. 729. From the decisions relied upon and pursuant to the discussion made h ereinbefore, we are constrained to hold that in a case where the Assessing Offic er decides to undertake scrutiny of the return filed in pursuance of a notice is sued under Section 158BC(a) and 142(1), he has to follow the rigours of sub-sect ions (2) and (3) of Section 143 as provided in Clause (b) of Section 158BC even in case of block assessment. The Court cannot read anything into a statutory pro vision which is plain and unambiguous. The language employed in a statute is the determinative factor of legislative intent [Ref: Padamsundra Rao (supra)]. For the discussion above and the ratio available in the judgment of the Hon'ble Supr eme Court in Dalmia (R) (supra) and various other decisions, we are of the view that the words so far as may be do not confer absolute discretion on the Asses sing Officer to dispense with the requirement of a notice under Section 143(2).

15. The learned Tribunal in the impugned judgment has observed that Clause (b) of Section 158BC only provide the manner of making assessment as prov ided in Section 143(2) in so far as practicably possible in respect of block ass essment and that the jurisdictional aspect ingrained in proviso to section 143(2) is not applicable in a block assessment. The learned Tribunal did not record a ny acceptable reason for discarding the decision in Bhagat Singh and Virendra Si ngh -Vs.- ACIT (2000) 75 ITD 1 (Delhi/TM), wherein it has been provided that non -service of notice under Section 143(2) will make the assessment void, and liabl e to be cancelled. The only ground cited is that the fact of the case at hand is distinguishable i.e. the return was not filed under Section 139 or in reply to the notice under Section 142(1). It is true that the return was filed by the ass essee in response to notice under under Section 158BC(a). Clause (b) of Section 158BC provides that the provisions of Section 142 as well as sub-sections (2) an d (3) of Section 143 shall apply even in case of a block assessment so far as ma y be. There is no dispute that in case of assessment under Chapter XIV, a notice under Section 143(2) is mandatory where the Assessing Officer proceeds to make an inquiry as provided in Section 142. Similarly, the provision of Section 143(2) will be mandatorily applicable in case of block assessment also where the Asse ssing Officer in repudiation of the return filed under Section 158BC(a) proceeds to make an inquiry in the proceeding under Chapter XIVB. Once the power of inqu iry under Section 142 is invoked, the Assessing Officer has no option but to fol low the provisions of Section 143(2). For this reason, we hold that the provisio ns of Sections 142 and sub-sections (2) and (3) of Section 143 will have mandato ry application in a case where the Assessing Officer in repudiation of the retur n filed in response to a notice issued under Section 158BC(a) proceeds to make a n inquiry. The defects crept-in cannot be cured at this stage in view of the lim itation provided in Section 143(2). The assessment order in the instant case thu s suffers from both procedural and jurisdictional error. The option left with t he Assessing Officer is to compute the income and levy taxes on the basis of the return filed by the assessee.

15. The question formulated is answered against the Revenue and in f avour of the Assessee. Consequent thereupon, the orders passed by the authoritie s below are set aside. The appeal, accordingly, stands allowed.

JUDGE JUDGE

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